Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands	)	WT Docket No. 03-66 RM-10586
	)	
Part 1 of the Commission's Rules - Further Competitive Bidding Procedures	)	WT Docket No. 03-67
	)	
Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service to Engage in Fixed Two-Way Transmissions	)	MM Docket No. 97-217
	)	
Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico	)	WT Docket No. 02-68 RM-9718
	)	

PETITION FOR PARTIAL RECONSIDERATION
OF THE WIRELESS COMMUNCIATIONS ASSOCIATION INTERNATIONAL, INC.

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January 10, 2005

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EXECUTIVE SUMMARY

The Wireless Communications Association International, Inc. ("WCA") urges the Commission on reconsideration to make the following modifications to the rules and policies adopted in the *Report and Order* in this proceeding.

Most importantly, the Commission must reconsider its decision to require that a proponent transition, at a minimum, all of the stations within a given Major Economic Area ("MEA"). The Commission's objectives and the interests of consumers will be far better served by using Basic Trading Areas ("BTAs") rather than MEAs as the geographic benchmark for transitions to the new Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") bandplan.

Regardless of whether MEAs or BTAs are the geographic unit utilized for managing transitions, further revisions to the newly-adopted rules governing transitions to the new bandplan are essential to promote the Commission's objectives and the public interest. To assure sufficient time for transitions to occur, the transition rules should remain in effect for 30 months following the effective date of rules permitting BTA-based transitions. BRS lessees should be permitted to serve as proponents, along with BRS licensees, EBS licensees and EBS lessees. The contents of the Initiation Plan specified in Section 27.1231(d) should be modified to eliminate the filing of information that can best be developed during the Transition Planning Period following the filing of the Initiation Plan. Because there are valid reasons why a proponent might withdraw an Initiation Plan, a proponent should be permitted one withdrawal of an Initiation Plan without penalty.

In addition, the rules governing responses to pre-transition data requests must be revised to assure that prospective proponents promptly receive sufficient information to craft Initiation Plans. To minimize the potential for "free riding" and to promote transitions, the provisions of Section 27.1233(c) governing the reimbursement of transition expenses must be expanded to provide proper reimbursement of proponents.

To expedite transitions and avoid disputes between proponents and EBS licensees, the Commission should adopt three additional safe harbors that were initially proposed by WCA, the Catholic Television Network and the National ITFS Association (the "Coalition"). Similarly, to avoid the potential for "greenmail", on reconsideration the Commission should adopt the Coalition's proposal that a licensee that objects to a reasonable transition plan be subject to a financial penalty.

The Commission should revisit its rejection of the Coalition's multichannel video programming distributors ("MVPD") opt-out proposal. Those MVPDs that serve at least 5 percent of the population of their service area or that were providing a video programming service utilizing more than seven digitized channels as of October 7, 2002 should receive an automatic opt-out from transitions, and should not be subject to the uncertainty and costs associated with securing an individualized waiver. However, the Commission should require that licensees covered by an MVPD opt-out cooperate with transitions and make appropriate

modifications to facilitate transitions. In addition, on reconsideration the Commission must provide an alternate bandplan to accommodate relocation of BRS channels from 2150-2162 MHz where the MVPD opt-out is exercised.

Fundamental fairness dictates that before incumbent licensees are stripped of their authorizations because their area has not been transitioned by a proponent, the Commission afford an opportunity for licensees to self-transition. WCA believes that an approach to self-transitioning can be crafted that is fair to licensees and will not delay transitions to the new bandplan.

Changes to the Commission's newly-adopted technical rules are necessary in some cases. To avoid unnecessarily precluding transitions, the rules applicable to the provision of D/U ratio-based interference protection must be modified consistent with suggestions first advanced by the Coalition. In addition, the newly-adopted rule governing the maximum allowable signal strength at a Geographic Service Area ("GSA") boundary requires revision to address situations where bandwidths other than 5.5 MHz are utilized. Moreover, under no circumstances should a licensee be permitted to exceed the maximum permissible signal strength at its GSA boundary absent consent from the cochannel licensee.

The rules governing out-of-band emissions limits set forth in Section 27.53(l) should be modified. To avoid interference to operating systems, the stricter base station mask provided for in Section 27.53(l)(2) should be applicable upon request as requested by the Coalition, rather than after interference has been suffered and the Commission resolves a documented complaint. All user stations, not just mobile user stations, should be required to attenuate out-of-band emissions by not less than 43 + 10 log (P) dB at the channel edge and 55 + 10 log (P) at 5.5 MHz from the channel edge. In addition, the Commission should modify Section 27.53(l) to impose additional attenuation requirements on fixed user stations with transmission antennas that are affixed to the outside of a building or other non-antenna structure, or appurtenance thereto, or that are affixed to a tower, mast or other structure installed outdoors for the purpose of supporting antenna. In addition, the rules governing BRS out-of-band emissions below 2495 MHz must be clarified to reflect the Commission's insertion of a guardband at 2495-2496 MHz.

Finally, to provide licensees with certainty regarding their authorized service area, the Commission should clarify how GSA boundaries will be established under certain circumstances.

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PETITION FOR PARTIAL RECONSIDERATION

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby petitions the Commission for partial reconsideration of the *Report and Order* in the above-captioned proceeding.[1]

I. INTRODUCTION.

With the release of the *Report and Order*, the Commission has made substantial progress in its unprecedented effort to create a new regulatory framework for Broadband

[1] *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004)["*Report and Order*" and "*FNPRM*," respectively].

Radio Service ("BRS") and Educational Broadband Service ("EBS") licensees in the 2.5 GHz band, putting the BRS/EBS industry on a path towards a *bona fide* flexible use model that promotes rapid deployment of broadband and other new services in response to market demand, while still providing spectrum for high-power, high-site facilities in the 2.5 GHz spectrum.

Unfortunately, although the overwhelming majority of those commenting in response to the *Notice of Proposed Rulemaking* ("*NPRM*")[2] urged the Commission to adopt the industry-wide consensus plan that had been advanced in October 2002 by WCA, the National ITFS Association ("NIA") and the Catholic Television Network ("CTN") (the "Coalition Proposal"),[3] the Commission chose to part company with WCA, NIA and CTN on several important issues. As will be discussed below, WCA believes that the failure to adopt certain components of the Coalition Proposal was due to oversight or misunderstanding, and that the Commission should on reconsideration adopt the appropriate portion of the Coalition Proposal. With regard to other issues on which the *Report and Order* rejected the Coalition Proposal, WCA appreciates the Commission's concerns, is prepared to accept an alternative approach, but believes that

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[2] *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 18 FCC Rcd 6722 (2003)["*NPRM*"].

[3] *See* "A Proposal For Revising The MDS And ITFS Regulatory Regime," Wireless Communications Ass'n Int'l, Nat'l ITFS Ass'n and Catholic Television Network, RM-10586 (filed Oct. 7, 2002)["Initial Coalition Proposal"]. Subsequent to October 7, 2002, WCA, NIA and CTN submitted two supplements that addressed issues left open in the original white paper and sought to clarify points that apparently had been misunderstood by some parties within the industry. *See* "First Supplement To 'A Proposal For Revising The MDS And ITFS Regulatory Regime,'" RM-10586 (filed Nov. 14, 2002)["First Coalition Supplement"]; "Second Supplement To 'A Proposal For Revising The MDS And ITFS Regulatory Regime,'" RM-10586 (filed Feb. 7, 2003)["Second Coalition Supplement"]. For simplicity's sake, unless the context requires a different meaning, references to the "Coalition Proposal" in these comments should be read to reference all three filings.

modifications to the newly-adopted rules are required to assure that the best interests of the public are served.

II. THE COMMISSION'S OBJECTIVES AND THE INTERESTS OF CONSUMERS WILL BE FAR BETTER SERVED BY USING BTAS RATHER THAN MEAS AS THE GEOGRAPHIC BENCHMARK FOR TRANSITIONS TO THE NEW BRS/EBS BANDPLAN.

In the months leading up to the filing of the Coalition Proposal, perhaps no issue engendered more discussion within the BRS/EBS industry than the process of transitioning from the current bandplan to a new one. And no component of the transition process received greater focus than identifying which licensees would have to be party to a given transition. Ultimately, the Coalition Proposal called for a process by which a proponent would be required to transition itself, plus any other licensee whose operations might suffer a cognizable risk of interference as a result of the transition of other parties to the transition.[4]

Not surprisingly, only a relatively small number of parties objected to the Coalition's transition plan, and the Coalition amply demonstrated that their counterproposals were based on fundamental misunderstandings about the Coalition's plan or otherwise would have done the BRS/EBS industry substantially more harm than good.[5] Indeed, the few who objected to the Coalition's transition plan did so out of

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[4] *See* Initial Coalition Proposal at App. B, p. 2. *See also* Comments of WCA, NIA and CTN, WT Docket No. 03-66 at 40-41 (filed Sept. 9, 2003)["Coalition Comments"] ("The fact that those who are going to do the relocating, and those that are going to be relocated, have agreed to potentially rapid transitions proposed by WCA, NIA and CTN speaks volumes. NIA and CTN are satisfied with the requirements designed to promote rapid transition in exchange for the absolute assurance that the specified costs of transition will be paid by the Proponent, while WCA (from which most Proponents will be drawn) is satisfied to have no sunset date after which [EBS] licensees would have to transition at their own cost and to bear its own costs at all times."); Reply Comment of WCA, NIA and CTN, WT Docket No. 03-66 at 2 (filed Oct. 23, 2003)["Coalition Reply Comments"].

[5] *See* Coalition Reply Comments at 37-54.

concern that the transition process would be overly complicated, would require many more licensee transitions than necessary, would take substantial amounts of time to complete, and would impose unreasonable costs on proponents.[6] Ironically, as demonstrated below, the Commission's decision to mandate transitions based on Major Economic Areas ("MEAs") virtually guarantees that all of these will occur. The record developed in response to the *NPRM* establishes conclusively that the Coalition's transition plan was vastly superior to any alternative advanced, and was the only plan which received widespread industry support in this proceeding.[7]

Given the widespread support within the industry for the Coalition Proposal, WCA is disappointed that the Commission has chosen to steer a different course – to require that a proponent transition all stations within a given MEA.[8] This approach, which received no support whatsoever in comments or reply comments submitted in response to the *NPRM,* is fundamentally flawed and will not achieve the Commission's objectives.

WCA certainly is cognizant that the system proposed by WCA, NIA and CTN for identifying the parties to a given proposal was not simple. Thus, WCA is not asking the Commission on reconsideration to adopt that initial proposal. WCA is prepared to accept an approach under which transitions will generally occur based on pre-defined geographic areas, but objects strenuously to the selection of MEAs as the geographic

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[6] *See, e.g.,* Comments of Spectrum Market, WT Docket No. 03-66 at 4 (filed Sept. 8, 2003); Comments of Grand Wireless, WT Docket No. 03-66 at 9-11 (filed Aug. 26, 2003); Comments of the Illinois Institute of Technology, WT Docket No. 03-66 at 22-23 (filed Sept. 8, 2003)["IIT Comments"]; Comments of Adams Telecom, Central Texas Communications, and Leaco Rural Telephone, WT Docket No. 03-66 at 4 (filed Sept. 8, 2003).

[7] *See*, *e.g.,* Coalition Reply Comments at 37.

[8] *See Report and Order*, 19 FCC Rcd at 14197 ¶ 72.

areas to be employed. Simply put, MEAs are so much larger than the service areas utilized in licensing BRS and EBS facilities that the costs to a given proponent associated with a given transition no longer bear any rational relationship to the benefits that proponent will derive. The Commission's model requires transitions over vast geographic areas, with proponents forced to shoulder all the costs and other burdens thereof with no countervailing benefit. Rather than spur transitions, this deters them. There is a better way.

Specifically, WCA proposes that the Commission utilize Basic Trading Areas ("BTAs"), rather than MEAs, as the basic building blocks for transitions. In connection with a given transition, all of the stations licensed to the BTA authorization holders should be transitioned,[9] along with all incumbent facilities associated with Geographic Service Areas ("GSAs") that have their centroids within the BTA. In addition, the proponent should be permitted, at its sole discretion, to transition: (i) any station outside the subject BTA that it believes necessary to transition to avoid interference within the BTA;[10] and (ii) any station outside the subject BTA where the proponent believes that such a transition will assist it in meeting the interference protection obligations set forth

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[9] In its comments being filed today in response to the *FNPRM,* WCA suggests that the Commission immediately conduct an auction of the EBS white space. However, given that bidders will be fully aware of the impending transition to the new bandplan, WCA urges the Commission to make clear that the winners of those auctions will not be entitled to replacement downconverters or migration of programming or data tracks to the Middle Band Segment ("MBS"). Rather, they should adjust their bids to reflect the costs that they will incur. There is no reason why proponents should be saddled with these additional costs.

[10] Although the *Report and Order* and the newly-adopted rules are not clear, there is some suggestion in Paragraph 86 and footnote 196 of the *Report and Order* that a proponent must study potential interference into its service area and transition operations outside the geographic area at issue and also transition any station outside that geographic area that poses a threat of interference. Certainly, WCA believes that a proponent should have the option of also transitioning any station outside the geographic area being transitioned if it poses an interference risk. However, as discussed below, WCA does not believe it is necessary for the Commission to be mandating interference studies or requiring the transition of additional stations if the proponent concludes it can accept the interference until the neighboring area is otherwise transitioned.

in Section 27.1233(b)(3). Because BTAs are already utilized in the licensing of BRS, and because they are of a size far closer to BRS/EBS service areas, use of BTAs will dramatically mitigate the adverse impact of the Commission's approach.

It is ironic that the Commission cites speed and simplicity as its reasons for adopting its approach, when only delay and additional complexity will result and consumers will pay the price. In response to the *NPRM,* the Coalition made it absolutely clear that mandatory transitions without regard to consumer demand would only add costs and delay to the transition process without promoting delivery of new services to the public:

> A marketplace approach along the lines of the Coalition Proposal has the added benefit [of focusing] on the provision of services to the public, not on effectuating transition for transition's sake. . .[T]ransition in and of itself is of no benefit to the public. Rather it is only when someone determines that the market is ready for a cellular service and is prepared to invest in such a service that the public benefits of the new bandplan start to accrue. As Chairman Powell recently noted, "infrastructure build-outs take time." The proposed market-by-market approach allows capital to be directed where it is needed most – the markets where operators are ready to deploy services that will benefit from the new bandplan – without forcing premature expenditures in markets where service will not be immediately deployed.[11]

Likewise, the Coalition left no doubt as to the importance of minimizing transition costs as much as possible:

> WCA, NIA and CTN recognized that an approach to transitions that resulted in excessive transaction costs (both direct financial expenditures and costs associated with unnecessary delay) could undermine the ultimate success of the [BRS/EBS band] as home to advanced wireless services. Thus, WCA, NIA and CTN carefully crafted their market-by-market approach so that it can be implemented in a manner that keeps transaction costs to a minimum. . ., [T]he transaction costs associated with their market-by-market approach will be kept within acceptable limits if the

[11] Coalition Comments at 37-38 (footnote omitted).

> Commission adopts their proposal for Proponent-led transitions and safe harbor policies that will largely eliminate the potential for dispute.[12]

As such, it is difficult to understand why the *Report and Order* does not explain in any detail why the Commission believes that forced MEA-wide transitions are superior to the Coalition's approach. For example, while the Commission confidently asserts that mandatory MEA-wide transitions "will ensure that the 2500-2690 MHz band is transitioned quickly,"[13] it does not explain how forcing a proponent to transition exponentially more BRS/EBS licensees than necessary to achieve the proponent's service goals will expedite the transition process. Similarly, while the Commission claims that mandatory MEA-wide transitions "will enable the provision of new and innovative services for all Americans, including those in rural areas,"[14] it does not explain how this objective is advanced by forcing a proponent to divert limited resources to effectuating transitions in areas where the proponent has no interest in providing service.

WCA's proposal for substituting BTAs is entirely consistent with the Commission's current policies on spectrum management, particularly as they relate to defining appropriate geographic service areas for flexible use licensees. The Commission has recently reaffirmed its commitment to "tailor the size of the licensed areas to balance the needs of the different prospective users of the spectrum together with other factors, including the unique characteristics of that spectrum."[15] The Coalition approach

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[12] *Id.* at 38-39 (footnotes omitted).

[13] *Report and Order*, 19 FCC Rcd at 14201 ¶ 82.

[14] *Id.*

[15] *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services*, WT Docket No. 02-381, Report and Order and Further Notice of Proposed Rulemaking, FCC 04-166 at ¶ 21 (rel. Sept. 27, 2004)["*Rural Wireless R&O*"]. *See also id.* at ¶ 24 ("Another important element of a service-specific methodology is that

embodies this principle – rather than forcing proponents into transitioning arbitrarily-defined geographic areas without regard to what the marketplace actually demands, the Coalition approach permits the proponent to target those geographic areas where it is licensed to meet demand for BRS/EBS service exists and to structure its transition plan and facilities design to ensure expedited delivery of new BRS/EBS service to those areas.

There is little question that mandatory MEA-wide transitions will be a financial and logistical nightmare for the BRS/EBS industry. Rather than having to transition only those BRS/EBS licensees that are required to mitigate harmful interference, a proponent must now face the prospect of transitioning all BRS/EBS licensees throughout its MEA, even those licensees that have no interference impact whatsoever on the services the proponent intends to provide. This is not a speculative concern: there are only 52 MEAs in the United States, and many of them encompass multiple metropolitan, mid-size and/or rural communities hundreds of miles apart, all of which a proponent would have to transition before delivering service to a single subscriber. Moreover, *approximately 25% of the BTAs used for BRS licensing overlap two or more MEAs, further complicating the transition process for BTA owners with no concomitant benefit to consumers.*

Commissioner Adelstein had it right when he noted:

> I am disappointed, though, that the Order moves forward with a transition process that is based on major economic areas (MEAs). The BRS and ITFS services are local services, and I believe that broadband deployment for the foreseeable future will be rolled out on a relatively localized basis. I am concerned that the obligation to transition an entire MEA will make it

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it takes into account any technical considerations associated with particular spectrum. For example, questions of whether and when new technologies would use the spectrum, and how much spectrum would be required for any such new technologies, may be considered in determining the appropriate geographic areas for a particular service. In addition, a service-by-service approach would allow the Commission to determine whether propagation characteristics in a particular band would make it more or less conducive to business models that are built on serving customers over a particular size of service area. This approach would help us to promote investment in and the rapid development of new technologies and services.").

> exceedingly difficult for proponents to effectuate transitions in their particular market.[16]

The seriousness of the problem becomes evident when the MEA-based approach is applied to specific markets. A compelling example of this is the predicament faced by the holder of the BRS authorization for the St. George, Utah BTA, which overlaps both the Los Angeles-San Diego and Phoenix MEAs. Clearly the prospect of having to fund and complete a BRS/EBS transition for the entire Los Angeles-San Diego MEA and the Phoenix MEA will strongly discourage the St. George BRS/EBS licensees from becoming transition proponents, even if consumers in St. George are demanding new BRS/EBS service.[17] One does not have to run the numbers to determine that the costs, delays and other logistical difficulties associated with transitioning the exponentially larger Los Angeles-San Diego and Phoenix MEAs undermine any economic case for introducing new BRS/EBS service to St. George.

Nor is this example an anomaly. The authorized service areas of stations located in rural Cridersville, OH overlap *four* MEAs (Detroit-Ann Arbor-Flint, Chicago, Columbus, and Cincinnati-Dayton). Clearly, the Cridersville licensees could not transition all affected BRS/ITFS licensees in those MEAs within any reasonable length of time or at a reasonable cost, and forcing them to do so would yield no benefits to consumers. The unavoidable fact is this: where a proponent's service area is much smaller than its MEA (which is likely to be the case virtually everywhere in the country), a proponent may reasonably determine that there is no economic justification for

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[16] *Report and Order*, 19 FCC Rcd at 14384 (Separate Statement of Commissioner Jonathan Adelstein).

[17] Large portions of the MEAs are so well beyond the radio horizon of any operations in the BRS/EBS band that they illustrate the absurdity of suggesting that there is any interference-based relationship between St. George and these other markets.

transitioning an MEA as a precondition for introducing service to a much smaller area. Of course, where the proponent elects not to proceed, service to consumers is delayed or denied – the very result that the Commission is trying to avoid in this proceeding.[18]

The Commission's purported safeguard for dealing with this issue is misguided. Paragraph 80 of the *Report and Order* leaves little doubt that the Commission is relying heavily on the fact its new rules permit more than one proponent to transition an MEA.[19] Certainly, if the Commission retains its MEA-based approach, there will be situations in which operators or licensees in different regions of an MEA will come together to jointly plan a transition of the MEA. But the *Report and Order* begs the question – *what if they don't*? The Commission's hope for multiple proponents within an MEA takes no account of the possibility that potential proponents in an MEA may have chosen different business plans or different technologies that are at different stages of development and therefore have different time frames within which to construct and operate their systems. For example, what becomes of the system operator in St. George if the licensees in Los Angeles, San Diego or Phoenix do not want to deploy as quickly as it does? The answer is simple, the St. George operator must wait, and the public in St. George is denied service. Indeed, the approach adopted in the *Report and Order,* coupled with that proposed in the *FNPRM,* could be even more devastating to the St. George operator and licensees – if the licensees in any part of the Los Angeles-San Diego or Phoenix MEA decide they would prefer to accept the Commission's offer of bidding credits and do not

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[18] It is therefore ironic that the Commission should criticize the Coalition's plan as forestalling transitions in some areas of the country "for many years," since the Commission's approach virtually ensures that result. *See Report and Order*, 19 FCC Rcd at 14201 ¶ 82.

[19] *Id.* at 14200 ¶ 80 ("We stress that more than one proponent may transition a particular MEA. Thus we do not believe that our decision to transition by MEA would be burdensome to proponents.").

elect to fund a transition, the St. George operator and licensees will be unable to fund the transition of the two MEAs themselves and will lose their licenses. The fact that transferable bidding credits will then be available will be little solace to the operator of the St. George system, since it has invested substantial funds in building and operating a going concern – none of which is considered in calculating the amount of bidding credits.

Clearly, the Commission's approach does rural BRS/EBS licensees in particular, no favors. Here the Commission's findings in the *Rural Wireless R&O* bear repeating:

> [W]e conclude that our market-oriented policies, in tandem with substantial capital investment by licensees, generally have led to the growth of valuable, productivity-enhancing wireless services to a vast majority of Americans, including many who reside, work or travel in rural areas. Nevertheless, we also conclude that there are additional steps that we can take in order to promote greater deployment of wireless services in rural areas, such as eliminating disincentives to serve or invest in rural areas, and helping to reduce the costs of market entry, network deployment and continuing operations.[20]

The Commission's approach qualifies as none of the above. Whereas WCA's BTA-based approach facilitates rural transitions by tying the process to consumer demand and limiting the geographic scope and cost of the transition process accordingly, the Commission throws all consideration of demand and cost aside. Rather, the Commission precludes a rural proponent from transitioning its own market unless it is willing to bear the enormous financial and logistical burdens of transitioning its entire MEA. The Commission's approach is exactly the opposite of the market-driven regulatory paradigm it is purportedly striving for in rural areas. It is also patently inconsistent with the Commission's statutory mandate to identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership

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[20] *Rural Wireless R&O* at ¶ 8.

of telecommunications services and information services," since, as shown above, forced MEA-wide transitions work to the decided disadvantage of smaller, rural-based BRS/EBS licensees.[21] This means, ultimately, that the Commission cannot make the finding required under the Regulatory Flexibility Act ("RFA") that it has taken steps "to minimize the significant economic impact [of its new rules] on small entities," with a sufficient explanation of "why each one of the other significant alternatives to the rule . . . which affect the impact on small entities was rejected."[22]

III. REGARDLESS OF WHETHER MEAS OR BTAS ARE THE GEOGRAPHIC UNIT UTILIZED FOR MANAGING TRANSITIONS, FURTHER REVISIONS TO THE NEWLY-ADOPTED RULES GOVERNING TRANSITIONS TO THE NEW BANDPLAN ARE ESSENTIAL TO PROMOTE THE COMMISSION'S OBJECTIVES AND THE PUBLIC INTEREST.

A. The Transition Rules Should Remain In Effect For 30 Months Following The Effective Date Of Rules Permitting BTA-Based Transitions.

For the reasons set forth in Section II above, it is unrealistic to expect many holders of BRS and EBS authorizations to initiate transitions under a set of rules that require the proponent to fund the transition of all EBS stations within a given MEA.

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[21] *Section 257 Triennial Report to Congress; Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses*, Report, 19 FCC Rcd 3034, 3037-38 (2003), *quoting* 47 C.F.R. § 257(a). *See also* 15 U.S.C. § 631a(a) ("For the purpose of preserving and promoting a competitive free enterprise economic system, Congress hereby declares that it is the continuing policy and responsibility of the Federal Government to use all practical means and to take such actions as are necessary . . . in order to: foster the economic interests of small businesses . . . .").

[22] 5 U.S.C. § 604(a)(5). The final RFA analysis supplied as Appendix B to the *Report and Order* includes no meaningful analysis of any of the issues discussed above. Indeed, the analysis includes no discussion whatsoever of why forced MEA transitions are superior to the Coalitions approach insofar as small businesses are concerned. Instead, the Commission merely states the following: "With regard to the possible daisy chain problem, we have modified the Coalition plan to transition to the new band plan using larger areas than the Coalition recommends." *Report and Order*, 19 FCC Rcd at 14318 App. B, ¶ 39. As shown above, however, the Commission's approach only exacerbates the problem. Elsewhere, the Commission merely restates the obvious: "[L]icensees that must transition to the new band plan will be affected in that some will have to bear the costs of such transition. However, the record reflects that licensees unanimously agree that the band plan must be modified, and the transition costs are outweighed by the value and utility of converting the band plan . . . ." *Id*. at 14318 App. B, ¶ 40. Again, this says nothing about why the Commission's choice of forced MEA-wide transitions is the better option for small businesses, and as such cannot be squared with the Commission's obligations under the RFA.

WCA trusts that the Commission will agree that its objective of promoting transitions, and particularly transitions that will spur the deployment of licensed wireless broadband services in smaller communities, will best be served by amending Section 27.1231 *et seq.* to provide for transitions to be BTA-oriented.

The objective of such a change, however, will be undermined unless the Commission allows prospective proponents sufficient opportunity to submit Initiation Plans following the effective date of the revised rules. At present, Section 27.1231(b) provides for the new transition rules to sunset three years following their January 10, 2005 effective date, except with respect to transitions proposed in Initiation Plans filed with the Commission by that date. To provide prospective proponents a fair opportunity to transition under BTA-oriented rules, WCA recommends that Section 27.1231(b) be amended to provide that the new transition rules remain applicable until 30 months (two and one-half years) following the effective date of the amendment changing the focus of transitions under Section 27.1231 from MEAs to BTAs.

B. BRS Lessees Should Be Permitted To Serve As Proponents.

Newly-adopted Section 27.1231(d) provides that a proponent may be a BRS or EBS licensee, or an EBS lessee. However, for reasons that are not explained in the *Report and Order*, the Commission has not permitted lessees of BRS spectrum to serve as proponents.[23] Since there are markets where systems may be developed by operators utilizing solely leased BRS spectrum, and since system operators are the most likely entities to serve as proponents, the Commission's objective of promoting rapid transitions

[23] This failure is despite the fact that WCA, NIA and CTN had specifically suggested that the lessee of any 2.5 GHz band spectrum be permitted to serve as a proponent. *See* Initial Coalition Proposal at App. B, pp. 12-15.

will be advanced by amending Section 27.1231(d) to permit BRS spectrum lessees to serve as proponents.

C. The Contents Of The Initiation Plan Specified In Section 27.1231(d) Should Be Modified.

Two modifications to Section 27.1231(d), which specifies the contents of an Initiation Plan, should be adopted. The fundamental problem with Section 27.1231(d) is that it requires too much information from a proponent at the very beginning of the transition process. At the time an Initiation Plan is filed, all that has occurred is an exchange between the proponent and EBS licensees of pre-transition data requests and responses thereto. The real planning comes later, during the Transition Planning Period. As explained in the Coalition Proposal:

> The Transition Planning Period is intended to serve a variety of objectives. As noted above, it is during the Transition Planning Period that the Proponent and affected ITFS licensees will agree on the logistical details of required downconverter replacements and video and data migration to the MBS. The Transition Planning Period also provides a forum for the various parties to discuss their plans and objectives and, as such, provides a vehicle for agreement on frequency usage and assignments that may deviate from the default provisions set forth in Attachment 1. For example, through exchange of information as to which licensees require MBS spectrum and which do not, it provides a vehicle for arranging channel swaps. Where licensees are going to be sharing licenses or equipment following the transition, the Transition Planning Period provides an opportunity to agree on logistical details or agree to alternative arrangements. And, as noted above, it allows the Proponent to identify the costs that will be incurred if it proceeds with a transition.[24]

Thus, the Commission should eliminate the requirement of Section 27.1231(d)(3) that each Initiation Plan include "a statement indicating that the engineering analysis to transition all of the BRS and EBS licensees in the MEA(s) has been completed." It is not clear what "engineering analysis" the Commission is requiring – the newly-adopted Part

[24] *Id.* at App. B, pp. 18-19.

27 rules do not require any specific analysis be done prior to initiating a transition. More importantly, there is no reason any Commission-mandated engineering analysis should be required prior to the submission of an Initiation Plan. Indeed, until the Transition Planning Period has occurred, a proponent will not know for certain what operations will be on what channel and what the licensee of each channel requires in the way of facilities and interference protection. Rather than mandate premature analyses based on minimal information, the Commission should instead promote the Transition Planning Period as an opportunity for the free exchange of information and the development of cooperative approaches that meet the varying needs of the affected licensees.

Along similar lines, until the Transition Planning Period has run, it is unrealistic for the Commission to expect a proponent to meet the requirement of Section 27.1231(d)(4) that the Initiation Plan include a statement of "when the transition plan will be completed." A potential proponent cannot possibly provide an accurate response to that inquiry until it has fully explored a variety of logistical issues during the Transition Planning Period. Section 27.1232(b)(1)(vi) requires that the Transition Plan – which is drafted by the proponent during the Transition Planning Period – provide an approximate timeline for the completion of the transition. There is no reason why compliance with that requirement is not sufficient.

In addition, the Commission should clarify the statement in Paragraph 88 that "[t]he Transition Plan must include plans for relocating the EBS and BRS incumbents from spectrum that has been redesignated for MDS 1 and 2 under the rules adopted today."[25] Certainly, WCA does not dispute that after a transition, the spectrum at 2496-

[25] *Report and Order*, 19 FCC Rcd at 14203 ¶ 88.

2502 MHz and at 2618-2624 MHz will be available for the relocation of BRS channels 1 and 2 from the 2150-2162 MHz band. However, there is absolutely no basis for requiring that the proponent fund in any way, shape or form the relocation of BRS operations from 2150-2162 MHz. Indeed, although WCA generally agrees that BRS licensees should be funding their own transitions as provided for in Section 27.1233(c), there is absolutely no basis for imposing on the licensees of BRS channels 1 and 2 the obligation to fund their migration from the 2.1 GHz band to the 2.5 GHz band. That migration is occurring for one reason, and one reason only – the Commission is re-auctioning the BRS spectrum for Advanced Wireless Service ("AWS"). WCA has pending before the Commission in ET Docket No. 00-258 proposals for addressing the costs of BRS relocation from 2150-2162 MHz.[26] That is the appropriate docket for this issue to be resolved, although the Commission should make clear that it is not in this proceeding seeking to impose any migration obligations on the proponent.

D. The Commission Should Allow One Withdrawal Of An Initiation Plan Without Penalty.

WCA urges the Commission to reconsider its determination that once a proponent submits an Initiation Plan, it cannot withdraw that plan without being thereafter barred from submitting another Initiation Plan for the area.[27] That provision is unduly harsh, could unnecessarily preclude some transitions, and thus should be revised.

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[26] *See* Attachment to "A Compromise Solution for Relocating MDS From 2150-2162 MHz," attached as an appendix to Letter from Wireless Communications Ass'n Int'l, *et al.*, to Michael K. Powell, Chairman, Federal Communications Commission, ET Docket No. 00-258 (filed Jul. 11, 2002); Comments of Wireless Communications Ass'n Int'l, ET Docket No. 00-258 at 28-44 (filed Apr. 14, 2003); Letter from Wireless Communications Ass'n Int'l, *et al.*, to Michael K. Powell, Chairman, Federal Communications Commission, ET Docket No. 00-258 at Appendix A (filed Apr. 7, 2004).

[27] *Id.* at 14208 ¶ 87.

The *Report and Order* is silent as to the rationale behind this provision, and thus WCA can only speculate as to what drove the Commission to include it. Suffice it to say that WCA has no desire to see Initiation Plans filed for reasons of regulatory gamesmanship, and certainly agrees that some restriction is necessary. However, WCA also recognizes that in many markets, transitions will be complicated, expensive affairs. The filing of the Initiation Plan is just one of the first steps in the process. Only during the Transition Planning Period contemplated by Section 27.1232(a) will the proponent be able to identify with precision the costs and complexities associated with a given transition. Thus, someone acting in good faith may well submit an Initiation Plan, commence the transition process, but based on information gained during the Transition Planning Period, reasonably conclude that it cannot submit a viable Transition Plan 30 days prior to the end of the Transition Planning Period or otherwise commit to the obligations associated with being the proponent of a given transition.[28] Yet, that same party may be committed to the process of transitioning the market and thereafter continue efforts to develop a viable approach to transition. There is no benefit to denying such a party a second bite at the apple, as it may be the best hope for transitioning the market.

As such, WCA suggests that the Commission allow one who withdraws its first Initiation Plan the opportunity to submit a second Initiation Plan for the same geographic area. This approach recognizes that there are legitimate reasons to abandon an Initiation Plan, but avoids regulatory game playing.

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[28] Although it is not clear from the rules, WCA presumes that if a proponent does not submit a Transition Plan within the timeframe established by Section 27.1232(b), it will be deemed to have withdrawn its Initiation Plan.

E. The Rules Governing Responses To Pre-Transition Data Requests Must Be Revised To Assure That Prospective Proponents Promptly Receive Sufficient Information To Craft Initiation Plans.

Although WCA is generally in agreement with the provisions of Section 27.1231(f) governing "pre-transition data requests," it believes that two revisions to that section are necessary to fulfill the Commission's objectives.

First, the Commission must establish a deadline by which responses to pre-transition data requests are submitted to a potential proponent. The *Report and Order* recognized that "all of the necessary information is not publicly available in the Commission's records," and thus concluded that "it is necessary for licensees . . . to provide certain information to a potential proponent(s)."[29] However, the new rules do not establish a deadline for licensees to respond to pre-transition data requests. WCA suggests that an EBS licensee be required to respond within twenty-one (21) days of receipt of the pre-transition data request.[30] WCA urges the Commission to make clear that in the absence of a response, the potential proponent should be permitted to proceed with the transition without having to provide for the migration of any of the non-responsive licensee's programming tracks to the MBS, and without replacing any of that licensee's downconverters.[31]

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[29] *Report and Order*, 19 FCC Rcd at 14202 ¶ 84.

[30] The Coalition Proposal had similarly suggested a 21 day response period. *See* Initial Coalition Proposal at App. B, p. 15. However, the Coalition Proposal also would have mandated that the potential proponent make at least two attempts to contact both the licensee and the licensee's designated Universal Licensing System ("ULS") contact representative by telephone during normal business hours to ensure receipt of the pre-transition data request and that if the potential proponent makes contact with the licensee or its representative, and the licensee requests additional time to respond, the licensee should be given an additional fifteen (15) calendar days to respond. *See id.* WCA recognizes that the staff viewed this approach as unnecessarily burdensome for potential proponents and unnecessary to protect EBS licensees, and does not now suggest these additional requirements.

[31] Again, a similar approach was suggested in the Coalition Proposal. *Id.*

Second, the Commission must alter the provisions of Section 27.1231(f) setting forth the information that an EBS licensee is required to provide in response to a pre-transition data request. Although the language of the new rule tracks the Coalition Proposal, changes made by the Commission to the regulatory regime proposed by WCA, NIA and CTN require that additional information be included in responses to pre-transition data requests.

The problem, simply put, is that the Coalition Proposal contemplated a continuation of site-based licensing prior to any transition, and thus presumed that at the time a proponent planned a transition, the ULS would include that transmit parameters necessary to calculate desired signal level at a given EBS receive site. It is essential that a proponent know the desired signal level at each EBS receive site entitled to protection during the transition. It is only with that information that the proponent can assure compliance with its obligations under Section 27.1233(b)(3) to provide certain desired-to-undesired ("D/U") signal ratios. Because the Commission has elected to permit geographic licensing effective as of today, ULS will lack the information regarding EBS transmission facilities necessary for a proponent to calculate the desired signal portion of the D/U equation.

Thus, Section 27.1231(f) must be expanded to require that, in addition to the information required by the current version of that rule, when EBS licensees respond to a pre-transition data request, they also provide for each EBS receive site entitled to D/U interference protection under Section 27.1233(b)(3):

- The location (street address and geographic coordinates) of the main station or booster serving each EBS receive site entitled to protection;

- The make and model of the antenna for that main station or booster, along with the radiation pattern if it is not included within the Commission's database;

- The ground elevation (AMSL) of the building or antenna supporting structure on which the main station or booster transmission antenna is installed; the height (AGL) of the center of radiation of the transmission antenna; the orientation of the main lobe of the transmission antenna; any mechanical beamtilt or electrical beamtilt not reflected in the radiation pattern provided or included within the Commission's database;

- The bandwidth of each channel or subchannel, the emission type for each channel or subchannel, and the EIRP measured in the main lobe for each channel or subchannel;

- The make and model of the receive antenna installed at that site, along with the radiation pattern if it is not included within the Commission's database.

With this information, potential proponents will be able to reasonably calculate the feasibility of and costs associated with compliance with Section 27.1233(b)(3) and, if they move forward with a transition, assure compliance with the requirements of that rule. Without this information, however, the Commission cannot expect licensees to provide EBS operations being migrated to the MBS with interference protection based on D/U ratios.

F. The Provisions Of Section 27.1233(c) Governing The Reimbursement Of Transition Expenses Must Be Expanded To Minimize "Free Riding."

Newly-adopted Section 27.1233(c) provides that "BRS licensees in the LBS or UBS must reimburse the proponent(s) a pro rata share of the cost of transitioning the facilities they use to provide commercial service, either directly or through a lease agreement with an EBS licensee." While WCA applauds the Commission for adopting this provision in response to the proposal by WCA, NIA and CTN to preclude "free riding" on the efforts of the proponent,[32] WCA believes that two changes are necessary.

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[32] *See id.* at App. B, p. 28.

First, the Commission should expand the list of those responsible for reimbursing the proponent. The language of Section 27.1233(c) is more narrow than the Coalition Proposal in that it allows those who provide commercial service through leased BRS channels or their own EBS channels to escape any reimbursement obligation – by contrast, WCA, NIA and CTN had proposed that "whenever spectrum in the LBS or UBS is used to render commercial service (either directly or indirectly through a channel lessee), the party offering the commercial service should be required to reimburse its *pro rata* share of the cost of transitioning."[33] To avoid the "free rider" problem that could result from the exclusion of those who provide commercial service through leased BRS channels or their own EBS channels from the current version of the rule, the Commission should simply clarify that anyone who uses a licensed or leased BRS/EBS channel for commercial purposes must share in the reimbursement obligation.[34]

Second, to avoid future disputes between proponents and subsequent providers of commercial services, the Commission should expand Section 27.1233(c) to afford additional specificity as to how the proponent's costs will be allocated. More specifically, WCA believes that two concepts must be captured in revising Section 27.1233(c). First, the Commission should clarify that the costs of a transition will be allocated among future spectrum users on the basis of MHz/pops. This approach is the best for assuring that costs are spread among commercial operations in proportion to the benefit received. Second, the costs incurred by a proponent in transitioning a given BTA

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[33] *Id.*

[34] Although, as noted *supra*, WCA believes that ET Docket No. 00-258 generally is the appropriate venue for determining the obligations of the AWS auction winner in connection with the relocation of BRS channels 1 and 2, the Commission should here make clear that it expects the AWS auction winner to reimburse the proponent based on the *pro rata* share attributable to BRS channels 1 and 2.

should be allocated as a whole, rather than on a channel-by-channel basis. Recall that the transition process requires that operations on all channels in a market be modified at the same time, not on a channel-by-channel basis. As such, there is no reason to limit a newcomer's reimbursement obligation solely to the costs associated with clearing its own channels. Thus, for example, if after a market is transitioned, commercial operations commence on channels A1-3, the licensee of those channels should be obligated to reimburse its *pro rata* share of the costs of transitioning operations on all BRS/EBS channels, not just channels A1-3.

G. To Expedite Transitions, The Commission Should Adopt Additional Safe Harbors.

If the Commission adopts the proposals advanced by WCA here and in its comments in response to the *FNPRM*, implementing the transition should be a relatively simple process where all of the 2.5 GHz channels are collocated and operating with matched technical parameters and all of the EBS licensees are utilizing just one 6 MHz channel for the transmission of educational programming. However, it is a matter of record that there will be situations that deviate from that standard. To minimize disputes between proponents and licensees in these cases, the Coalition urged the Commission to establish a series of nine "safe harbors" that would allow proponents to craft Transition Plans with the knowledge that they will be deemed reasonable in the event of a dispute.[35]

While the *Report and Order* adopted four of the specific safe harbors proposed by WCA, NIA and CTN, the Commission refused to adopt the other five because, according to the *Report and Order*, "they are not of general applicability."[36] While WCA concedes

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[35] *See id.* at App. B, pp. 21-27.

[36] *See Report and Order*, 19 FCC Rcd at 14202 ¶ 90.

that certain of the rejected safe harbors would only apply in a handful of situations, three of those rejected by the Commission were designed to address fairly common scenarios. Thus, WCA urges the Commission on reconsideration to amend Section 27.1232(e) to address the following three situations.

First, the record developed in response to the *NPRM* demonstrates that there are numerous situations across the country where an EBS licensee will be entitled to secure more than one MBS track pursuant to Section 27.1233(b).[37] Under Safe Harbor #3 as proposed by the Coalition, in such circumstances, the Transition Plan would be deemed reasonable if, at the sole discretion of the proponent, it calls for either: (i) migration of one of those programming tracks to the EBS licensee's default channel in the MBS and provides the EBS licensee an additional 6 MHz channel in the MBS for each additional EBS track; or (ii) if it provides for the use of digital compression to meet that licensee's needs entirely on its own MBS channel.[38] Because of the number of markets where this may be an issue, the Commission should adopt a new safe harbor along the lines proposed by WCA, NIA and CTN.

Second, the *Report and Order* rejected the Coalition's proposed Safe Harbor #4, which suggested a detailed approach regarding the migration of EBS operations to the MBS in cases where multiple licensees share a single channel group within a single

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[37] *See, e.g.* Comments of Stanford University and Northeastern University, WT Docket No. 03-66 at 6-11 (filed Sept. 8, 2003); IIT Comments at 6-9.

[38] *See* Initial Coalition Proposal at App. B, p. 24. The Coalition provided that if the proponent chooses the former option, the contributor of each additional MBS channel would be entitled to acquire at its option one of the recipient EBS licensee's channels in the Lower Band Segment ("LBS") or Upper Band Segment ("UBS") (along with the associated Transition Band channel) for each additional MBS channel provided. The additional MBS channels could be ones that would have been licensed to the proponent under the default system, or could be made available by way of channel swapping arrangements with other licensees in the market orchestrated by the proponent. *See id.* at App. B, p. 23.

geographic area.[39] Contrary to the implication of the *Report and Order*, in many cases multiple licensees currently share a channel group within a given area – indeed, according to a study conducted by Hardin & Associates, approximately 16% of all EBS stations share channel groups. The Hardin analysis illustrates the need for the Commission to adopt a safe harbor of general applicability to address how video programming and data tracks will migrate to the MBS in such cases. Thus, the Commission should adopt Safe Harbor #4 proposed by WCA, NIA and CTN, which specifically addressed this scenario.

Third, it is not infrequent that an EBS licensee utilizes one or more of its channels for studio-to-transmitter links. To provide proponents with a measure of certainty as to how they can address such links in a Transition Plan and consistent with the Coalition Proposal,[40] the Commission should now declare that it will be reasonable for a proponent to provide for either:

- the use of the LBS and/or UBS band for the point-to-point transmission of the EBS video or data (through superchannelization of the licensee's contiguous LBS or UBS channels), provided the proponent commits to retune the existing point-to-point equipment to operate on those channels or to replace the existing equipment with new equipment tuned to operate on those channels and the proposal complies with the LBS/UBS technical and interference protection rules;

- the migration of the EBS programming to the MBS by retuning the existing point-to-point equipment to operate in the MBS or replacing it with equipment tuned to operate in the MBS; or

- the replacement of the point-to-point link with point-to-point equipment licensed to the EBS licensee in alternative spectrum, so long as the replacement facilities meet the definition of "comparable facilities" set out in Section 101.75(b) of the Commission's microwave relocation rules.

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[39] *See id* at App. B, pp. 24-25.

[40] *See id.* at 28.

H. To Avoid The Potential For Greenmail, A Licensee That Objects To A Reasonable Transition Plan Should Be Subject To A Financial Penalty.

In the Coalition Proposal, WCA, NIA and CTN suggested that in those cases where a counterproposal is submitted in response to a Transition Plan, the proponent should be permitted to refer the issue to alternative dispute resolution, but in the interim move forward with the transition along the lines proposed in the counterproposal. In such a case, if it is ultimately determined that the initial Transition Plan was reasonable, the licensee that submitted the counterproposal would be required to pay "those additional documented costs incurred by the Proponent which were (i) over and above what the Proponent proposed in its Transition Plan, and (ii) directly related to implementing the counterproposal." [41] This was a critical component of the Coalition Proposal, as it "effectively precludes opportunities for licensees to extract 'greenmail' from Proponents anxious to deploy facilities under the new bandplan."[42] Although newly-adopted Section 27.1232(d) allows a proponent to transition according to its Transition Plan while awaiting a reasonableness determination, the proponent is not permitted to transition in accordance with the counterproposal and later secure the difference in costs should its initial Transition Plan be deemed reasonable.

By failing to adopt this provision, the Commission has created a regulatory approach that lacks any disincentive against the filing of frivolous or over-reaching counterproposals or those designed to extract greenmail or delay transitions for anticompetitive purposes. Unless the proponent is prepared to accept the risks associated

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[41] *Id.* at App. B, p. 21. *See also* Coalition Comments at 39 n. 76.

[42] Coalition Comments at 39 n. 76.

with implementing its own Transition Plan while a challenge is awaiting resolution, the market in issue will not be transitioned. By contrast, under the approach proposed by WCA, NIA and CTN, a proponent could move forward with the counterproposal and commence providing service under the new bandplan rapidly, while secure in the knowledge that it will be made whole financially if its initial proposal is found to have been reasonable. In fairness, the Coalition also proposed that the proponent reimburse the dispute-related costs of any licensee that objected to the initial Transition Plan if the Transition Plan is found to be unreasonable. If both components of the Coalition Proposal are adopted here, both proponents and licensees will have a financial incentive to act reasonably and not unnecessarily delay transitions.

I. The Commission Should Provide Qualifying MVPDs And Affiliate Licensees The Right To Opt-Out Of Transitions And Should Modify The Newly-Adopted Rules Accordingly.

1. The Commission Should Revisit Its Rejection Of The Coalition's MVPD Opt-Out Proposal.

Throughout the development of the Coalition Proposal, it was understood that the BRS/EBS industry's transition to the new bandplan could impose certain inconveniences on multichannel video programming distributors ("MVPDs") that utilized BRS/EBS spectrum. To mitigate those inconveniences, the Coalition Proposal recommended that the Commission allow MVPDs that serve 5% or more of the households within their GSA or that had deployed digital technology on more than seven channels as of October 7, 2002 to "opt-out" of the transition process.[43]

To add certainty to the process and minimize administrative burdens on both qualifying MVPDs and the Commission, the Coalition proposed a relatively simple opt-

[43] *See* Initial Coalition Proposal at App. B, pp. 16-18; First Coalition Supplement at 4-5; Coalition Reply Comments at 45.

out procedure under which the Commission would establish a 30-day window after the effective date of its new BRS/EBS rules, during which any qualifying MVPD would, if it intended to opt-out, certify to the Commission in writing that it qualified for opt-out treatment under the criteria proposed by the Coalition.[44] Upon close of the 30-day window, the Commission would publish the list of certifying MVPDs and their affiliated licensees – such publication would automatically authorize those parties to exercise their opt-out rights by so notifying their Transition Proponent no later than 30 days after commencement of the Transition Planning Period.[45]

Significantly, yet ignored by the *Report and Order,* the Coalition's proposal to afford MVPDs that serve more than 5% of the population within their GSA or that utilize more than seven digitized channels an automatic opt-out not only was supported by MVPDs that qualify to opt-out should they choose,[46] but *not one party participating in this proceeding opposed providing an automatic opt-out right to any MVPD that serves more than 5% of the population in its GSA or that is providing service on more than seven digitized channels.*

The *Report and Order* plainly is supportive of the MVPDs whom the Coalition tried to accommodate: "[W]e are sympathetic to the predicament of those MVPD licensees that developed successful businesses under the old rules, and to their customers that receive both video and broadband services from those MVPD licensees. We are also sympathetic to those BRS licensees that have a viable business for high-powered

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[44] *See* Initial Coalition Proposal at App. B, p. 17.

[45] *Id.* at App. B, p. 18.

[46] *See*, *e.g.* Comments of W.A.T.C.H. TV, WT Docket No. 03-66 at 2-6 (filed Sept. 8, 2003); Comments of Digital TV One, RM-10586 at 2-3 (filed Nov. 21, 2002).

operations, but who need more [than] seven digitized MBS channels to deliver service to their customers, which would constitute all of the high-power spectrum in the 2.5 GHz band."[47] WCA therefore is mystified as to why the *Report and Order* adopts the Coalition's proposed "opt-out" criteria but then undermines the process by forcing qualifying MVPDs to request and receive a case-by-case waiver from the Commission before exercising their opt-out rights in the marketplace.[48]

Certainly, a case-by-case waiver model subjects qualifying MVPDs to unnecessary uncertainty as to when they will be permitted to opt-out of the transition process. Given the investments qualifying MVPDs have made in developing their existing systems and delivering service to subscribers (the fundamental reason why the Coalition created the opt-out concept in the first place), the Commission should be making every effort to eliminate all uncertainty as to whether those MVPDs can to continue operations.[49] Moreover, the Commission's decision is hard to reconcile with its general preference for streamlined regulatory processes over case-by-case adjudications where the latter merely impose additional delay with no countervailing benefit.[50] Such

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[47] *Report and Order*, 19 FCC Rcd at 14199 ¶ 77.

[48] *See id.*

[49] *See, e.g., Ex Parte* Letter from Thomas Knippen, Vice President and General Manager, W.A.T.C.H. TV Company, to Chairman Michael K. Powell, Federal Communications Commission, WT Docket No. 03-66 at 2 (filed June 1, 2004) (noting that BRS/EBS operator W.A.T.C.H. TV has invested nearly $20 million in developing its existing digital multichannel video and "first generation" broadband system)["W.A.T.C.H. TV Letter"].

[50] *See, e.g., Review of Part 87 of the Commission's Rules Concerning the Aviation Radio Service*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 21432, 21449 (2003); *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613, 19698 (2001); *Streamlining the Commission's Rules and Regulations for Satellite Application and Licensing Procedures*, Report and Order, 11 FCC Rcd 21581, 21584 (1996).

streamlining is particularly appropriate here, since the Commission has limited eligibility for waivers to MVPDs who clearly merit relief.[51] As such, a case-by-case review of each qualifying MVPD's waiver request would appear to be a redundant exercise whose additional paperwork, administrative costs, time delays and associated regulatory uncertainty substantially outweigh any speculative benefit it might have to the public.[52]

Moreover, the Commission's justification for imposing a case-by-case waiver process here makes little sense. Specifically, the Commission contends that "adopting the Coalition's proposal . . . needlessly complicates the transition process,"[53] when in fact the Coalition's approach is demonstrably less burdensome than requiring a qualifying MVPD to prepare and file a waiver showing and forcing both the MVPD and the proponent to wait for Commission resolution at some undetermined point in the future. The Coalition's approach clearly provides far greater certainty to proponents – rather than subjecting a proponent to the uncertainty of whether and when a waiver request will be filed and granted, the Coalition's approach requires qualifying MVPDs to file their opt-out certifications with the Commission no later than 30 days after the effective date of the new BRS/EBS bandplan, after which proponents will know with certainty whether they must design around an exempt MVPD system.

The Commission also expresses concern that adoption of a blanket "opt-out" for high-powered MVPD licensees "may result in interference to licensees in neighboring

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[51] *See Report and Order*, 19 FCC Rcd at 14199-00 ¶ 77.

[52] For example, the Commission's waiver process would require a qualifying MVPD to demonstrate "why it cannot work within the transition rules [the Commission has] adopted," even though the opt-out process is predicated on the idea that for qualifying MVPDs a transition to the new bandplan is technically impossible or would otherwise cause substantial harm to their existing operations. *Id.*

[53] *Id.* at 14199 ¶ 76.

population centers."[54] Certainly there is some truth to that sentiment. Indeed, it is because of the potential for interference that the Coalition did not propose that every MVPD be entitled to opt-out of the transition. Rather, as discussed in detail in the Coalition's reply comments in response to the *NPRM*, the Coalition struck a delicate balance by carefully limiting eligibility to only those MVPDs with the most compelling cases. And, as discussed below in Section III.I.2, the Coalition proposed that those licensees entitled to take advantage of an MVPD opt-out be required to make certain system modifications in order to minimize interference.[55]

In short, the Commission's case-by-case waiver process appears to be a solution in search of a problem. The Coalition's approach properly restricted the MVPD opt-out to the most compelling cases, and assured neighbors that reasonable interference mitigation efforts would be undertaken. Thus, on reconsideration the Commission should adopt the MVPD opt-out procedures initially proposed by the Coalition.

2. The Commission Should Require That Licensees Covered By An MVPD Opt-Out Cooperate With Transitions And Make Appropriate Modifications To Facilitate Transitions.

Consistent with the Coalition Proposal, WCA again suggests that while any licensees excused from the transition process as the result of an MVPD opt-out may continue to operate utilizing the current bandplan, those licensees should be required to participate in the transition planning process in good faith and to subsequently make such modifications to their facilities at the proponent's expense as the proponent may reasonably request in an effort to reduce interference to the licensees in other markets that

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[54] *Id*.

[55] *See* Coalition Reply Comments at 44-51.

are transitioning.[56] As previously suggested, licensees should be required to reduce EIRP, reduce transmission antenna height, or add beam tilt where doing so can be accomplished without more than a *de minimus* reduction in the MVPD's ability to serve its then-existing subscribers.[57] Indeed, this requirement should be imposed whether the Commission permits MVPD opt-outs as a matter or right, or only on the basis of a waiver request.

3. The Commission Must Provide An Alternate Bandplan To Accommodate Relocation Of BRS Channels From 2150-2162 MHz Where The MVPD Opt-Out Is Exercised.

While the new bandplan provides relocation spectrum for BRS channel 1 and 2 licensees who are being displaced from the 2150-2162 MHz band by AWS licensees, the *Report and Order* is silent as to how the Commission intends to provide relocation spectrum in those markets where an MVPD opt-out precludes transition to the new bandplan. In that case, relocation of BRS channels 1 and 2 licensees to 2496-2502 MHz and 2618-2624 MHz is not feasible, since that spectrum would remain licensed to others under the current bandplan. As such, it effectively denies the affected AWS auction winners a place to relocate BRS channels 1 and 2, and effectively precludes the use of the 2150-2162 MHz band for AWS. Thus, the Commission can and should utilize this opportunity to address relocation issues in MVPD opt-out markets.

Accordingly, WCA offers an approach based in large part on a similar proposal originally offered earlier in this proceeding by qualifying MVPD W.A.T.C.H. TV

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[56] *See* First Coalition Supplement at 4-5..

[57] *See* Coalition Reply Comments at 44-51.

Company ("WTC").[58] Specifically, "opt-out" MVPD licensees on BRS channels 1 and 2 would be relocated as follows: (i) BRS channel 1 licensees would be moved to the 2496-2500 MHz band (*i.e.*, the spectrum outside the current 2.5 GHz band that was reallocated for fixed and mobile terrestrial use in IB Docket No. 02-364); and (ii) BRS channel 2 licensees would be relocated to the 2686-2690 MHz band, which is allocated to the underutilized I channels under the current bandplan. Admittedly, this leaves BRS licensees with 4 MHz less spectrum than they had at 2150-2162 MHz. However, such a result appears unavoidable given the limited amount of spectrum available outside the existing 2.5 GHz band. At least this approach provides operators in non-transitioned markets with access to 8 MHz of replacement spectrum that can be used for wireless broadband services. Although the adequacy of this amount of spectrum to accommodate relocation of existing BRS channel 1 and 2 operations will depend on a case-by-case analysis, WCA believes that it generally will be possible for the AWS auction winners to migrate BRS channel 1 and 2 operations to 2496-2500 MHz and 2686-2690 MHz by deploying cellularized systems that both accommodate the shorter path lengths at 2.5 GHz and provide for frequency reuse.[59]

WCA's compromise proposal is predicated on the proposition that the Commission will be adopting relocation rules for BRS channels 1 and 2 based on its existing microwave relocation rules (but with the changes suggested by the BRS industry over the past three years in ET Docket No. 00-258 to reflect the novel circumstances

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[58] *See* W.AT.C.H. TV Letter at 6-7.

[59] Of course, that migration will have to be accomplished in a way that does not cause harmful interference to operations on adjacent channels.

here).[60] Ultimately, however, it is critical that those rules require the AWS E Block auction winner to provide facilities operating on the replacement spectrum that can provide each qualifying licensee with service at the same throughput rate as it enjoys at the time of migration and have the same overall capacity as they have built out at the time.

IV. AN OPPORTUNITY SHOULD BE PROVIDED FOR ALL LICENSEES TO SELF-TRANSITION BEFORE THE COMMISSION AUCTIONS NON-TRANSITIONED SPECTRUM.

Under the Coalition Proposal, the timing of transitions would have been market-driven, with the decision as to if and when a given market should transitioned left to those best capable of determining whether local demand could best be served under the new bandplan. The *Report and Order* rejects that approach, and the *FNPRM* proposes a regulatory regime under which licensees that are not the subject of an Initiation Plan submitted by January 10, 2008 would eventually lose some or all of their authorized spectrum.[61]

With all due respect, WCA submits that this approach is unduly draconian. Even if the Commission adopts WCA's proposal to reduce transition areas to BTAs, there will be some licensees that desire to retain their authorizations but cannot economically justify the expense of transitioning all of the licensees in their BTA. Therefore, WCA urges the Commission to provide an additional stage to the transition system to accommodate such licenses.

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[60] **[cite to come]**

[61] *See FNPRM*, 19 FCC Rcd at 14266 ¶ 269.

Specifically, the Commission should provide an opportunity for licensees to self-transition. As noted above, WCA is proposing that Initiation Plans be filed no later than 30 months following the effective date of the rules adopted on reconsideration (the "Initiation Plan Filing Deadline"). No later than the date that is sixty days following the Initiation Plan Filing Deadline, every BRS and EBS licensees that is not covered by an Initiation Plan submitted by the Initiation Plan Filing Deadline should be required to file electronically with the Commission a notice as to whether it will self-transition, will vacate its spectrum entirely in exchange for bidding credits, or will vacate its LBS/UBS channels in exchange for financial assistance in migrating its operations to its MBS channel. A similar opportunity should be afforded licensees that were covered by an Initiation Plan as of the Initiation Plan Filing Deadline that is subsequently withdrawn. Then, after there has been a reasonable opportunity for the logistics of self-transitions to be arranged (which will certainly be sooner than 18 months from the Initiation Plan Filing Deadline), those licensees of BRS and EBS stations that elected to self-transition will have to either cease operations entirely or modify their operations so as to utilize their channels under the new bandplan in compliance with the applicable technical rules.

This approach is fundamentally fair to all BRS and EBS licensees, as no licensee will lose an authorization merely because it does not elect to fund the transition of all licensees in its region. And, it will in no way delay the day on which the entire 2.5 GHz band is operated in accordance with the new bandplan. To the contrary, it is completely consistent with the proposal advanced in the *FNPRM* to afford all incumbent licensees

that are not covered by timely filed Initiation Plans a minimum of 18 months (and often more) to cease operations under the former bandplan.[62]

V. TO AVOID UNNECESSARILY PRECLUDING TRANSITIONS, THE RULES APPLICABLE TO THE PROVISION OF D/U RATIO-BASED INTERFERENCE PROTECTION MUST BE MODIFIED.

Under newly-adopted Section 27.1233(b)(3) of the Commission's Rules, when conducting a transition, a proponent is required to provide each EBS licensee certain interference protection at qualifying EBS receive sites with compliance based upon the D/U ratio at the receive site. Although the new rule is based on the proposal advanced by WCA, NIA and CTN, for reasons unexplained in the *Report and Order*, the Commission did not include several specific elements advanced by the Coalition. Each of those proposals was designed to avoid unnecessary interference protection – protection that under the regulatory scheme of the *Report and Order* could preclude proponents from completing transitions. Thus, they should be adopted here on reconsideration.

Specifically, expanding the policy embodied in Section 74.903(a)(4) of the former Rules, the proponent should be permitted to propose as part of a Transition Plan to upgrade reception antennas at eligible EBS receive sites (but only to the extent such upgrades can reasonably be accommodated at a particular site based on zoning, structural or environmental considerations) if necessary to achieve the required D/U benchmarks.[63] Along similar lines, the Commission should permit a Transition Plan to call for the proponent to make other reasonable modifications at the receive site designed to assure

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[62] *See FNRPM*, 19 FCC Rcd. at 14274-76 ¶¶ 296-302.

[63] *See* Initial Coalition Proposal at App. B, p. 9; Coalition Comments at 72 n. 148.

that the appropriate protection is afforded.[64] To avoid protecting EBS receive sites where desired signal levels are unduly low, the proponent should not be required to provide D/U protection to any EBS receive site that is not prior to the transition receiving a desired signal carrier level of ≥ -80 dBm.[65] Finally, only a predicted undesired signal level greater than –106.2 dBm should be considered to be an undesired signal for purposes of determining whether an undesired signal level is unduly high.[66]

The Initial Coalition Proposal called upon the Commission to retain that 0 dB requirement adjacent channel D/U standard for protection of operations in the MBS.[67] However, upon further evaluation WCA, NIA and CTN advised the Commission in their comments in response to the *NPRM* that they believe the 0 dB D/U adjacent channel standard can safely be changed to a -10 dB D/U standard, and that this new standard could be employed whether the victim system is using analog or digital modulation.[68] As they explained at the time:

> Given the widespread deployment of television receivers that can tolerate a -10 dB adjacent channel D/U signal ratio without suffering material signal degradation, WCA, NIA and CTN agree that it would be overly-preclusive to retain the 0 dB standard to protect the relatively few television receivers still in use that require such a high level of protection.[69]

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[64] *See* Initial Coalition Proposal at App. B, p. 9.

[65] *See id.* at 37; *id.* at App. B, p. 9; Coalition Comments at 72 n. 148.

[66] *See* Initial Coalition Proposal at App. B, p. 9.

[67] *See id.* at 37.

[68] *See* Coalition Comments at 73.

[69] *Id.*

Thus, Section 27.1233(b)(3)(ii) should be amended on reconsideration to reflect that at the time of transition an eligible EBS receive sites should be entitled to no better than a -10 dB adjacent channel D/U signal ratio.

VI. THE RULES GOVERNING THE MAXIMUM ALLOWABLE SIGNAL STRENGTH AT A GSA BOUNDARY REQUIRE REVISION.

A. The Commission Should Amend Section 27.55(a)(4)(i) To Provide A Technology-Neutral Mechanism For Measuring Compliance With The Boundary Field Strength Limit.

In the Coalition Proposal, WCA, NIA and CTN suggested that a licensee operating on LBS and UBS channels be required to limit its signal level to no greater than 47 dBμV/m beyond its GSA.[70] Shortly after the filing of the Coalition Proposal, WCA, NIA and CTN learned that their proposal had engendered some confusion within the 2.5 GHz community because it did not specify the resolution bandwidth over which compliance is to be measured. To eliminate any confusion, WCA, NIA and CTN suggested in the First Coalition Supplement that the Commission clarify that the field strength limit of 47 dBμV/m is to be measured over a 5.5 MHz bandwidth (i.e. the bandwidth of an LBS/UBS channel) and that operations over different sized channels be adjusted by applying a factor of 10 log[(actual bandwidth MHz)/(5.5 MHz)].[71] The proposal for specifying and adjusting the maximum permissible signal level based on channel bandwidth was reiterated by WCA, NIA and CTN in the Coalition Comments, and was not opposed by any party commenting on the *NPRM*.[72]

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[70] *See* Initial Coalition Proposal at 26-27.

[71] *See* First Coalition Supplement at 3-4.

[72] *See* Coalition Comments at 42 n. 83.

Although the Commission has adopted a channel-bandwidth adjustment for measuring compliance with the maximum signal strength applicable to the MBS channels,[73] it has not adopted the unopposed proposal advanced by WCA, NIA and CTN for adjusting the maximum signal strength in the LBS and UBS based on channel bandwidth. Rather, Section 27.55(a)(4)(i) specifies no resolution bandwidth for pre-transition measurements, while Section 27.55(a)(4)(ii) provides that following transition the field strength is to be measured "over the channel bandwidth (i.e., each 5.5 MHz channel for licensees that hold a full channel block, and for the 5.5 MHz channel for licensees that hold individual channels)." Nowhere in the *Report and Order* does the Commission explain why it has adopted this formulation, rather than that advanced by the industry. Thus, possible, WCA urges the Commission to revise Section 27.55(a)(4)(i) and (ii) in the manner proposed in the First Coalition Supplement.

B. Under No Circumstances Should A Licensee Be Permitted To Exceed The Maximum Permissible Signal Strength At Its GSA Boundary Absent Consent From The Cochannel Licensee.

Although not proposed by the Coalition or suggested by any party commenting on the *NPRM,* newly-adopted Section 27.55(a)(4) allows licensees to exceed the maximum signal strength at the GSA boundary "where there is no affected licensee that is constructed and providing service." WCA urges the Commission to repeal this provision, and confirm that a licensee may only exceed the maximum permissible signal strength at its GSA boundary with the consent of the affected cochannel licensee.

The *Report and Order* explains that Section 27.55(a)(4) has been adopted in response to concerns that the 47 dBμV/m signal strength limit is too stringent to permit

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[73] *See* 47 C.F.R. § 27.55(a)(iii).

adequate service in border areas.[74] WCA, NIA and CTN have previously disproved that notion by demonstrating a variety of techniques that can be employed to provide service to border areas within running around afoul of the 47 dBμV/m limit.[75] More importantly, however, permitting a licensee to exceed that limit on a temporary basis, subject to cessation on a moment's notice when a neighboring licensee commences operations, is hardly a solution that benefits the public. The Commission should be encouraging licensees to construct facilities that can provide reliable service to the public, and that is not what Section 27.55(a)(4) does.

If the Commission does not repeal Section 27.55(a)(4), then it must clarify its provisions in two respects. First, the Commission should reconsider its statement in footnote 207 of the *Report and Order* to the effect that a licensee's testing of facilities does not constitute sufficient service that it can insist that its neighbor comply with the 47 dBμV/m signal strength limit. To ready a network before commencing service to the public, a licensee is necessarily going to have to do extensive testing, particularly if it will be providing a service where consumers demand ubiquitous service availability. A licensee cannot possibly evaluate the performance of its network during this testing phase if it is subject to interfering signals from a neighboring GSA. Thus, if the Commission retains the rule, the Commission should make clear that transmissions in connection with network design and testing qualify as the provision of service.

Second, if the Commission retains Section 27.55(a)(4), it should add certain procedures to assure compliance and minimize dispute. The Commission should require

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[74] *See Report and Order*, 19 FCC Rcd at 14209 ¶ 109.

[75] *See* Initial Coalition Proposal at 28.

any licensee that does exceed the 47 dBμV/m benchmark to notify the cochannel licensee in the adjacent GSA so that its neighbor will know of the potential for interference. And, the Commission should make clear that the licensee exceeding the 47 dBμV/m signal strength must *immediately* bring its operations into compliance once it becomes aware that a neighbor has commenced service, even if that means shutting down facilities that are providing service to consumers. Retention of Section 27.55(a)(4) creates an environment rife for dispute, since it necessarily calls for one licensee to cease service offerings. There should be no room for debate here if the Commission retains the rule – the licensee that is in violation of the 47 dBμV/m requirement must be absolutely obligated to immediately cease its operations. Otherwise, the Commission will have created a nightmare, spawning disputes that will require Commission resolution and in the interim preventing victim licensees from offering interference-free service to the public.

VII. THE RULES GOVERNING OUT-OF-BAND EMISSIONS LIMITS SET FORTH IN SECTION 27.53(L) SHOULD BE MODIFIED.

Newly-adopted Section 27.53(l) of the Rules sets forth the out-of-band emissions limits imposed on BRS and EBS licensees. WCA urges the Commission to modify those rules in the following respects.

A. The Stricter Mask Provided For Base Stations Should Be Applicable Without Awaiting The Resolution Of A Documented Complaint.

The Coalition Proposal urged the Commission to adopt a dual spectral mask for base stations operating in the LBS and the UBS. Specifically, WCA, NIA and CTN suggested in addition to the traditional 43 + 10 log (P) mask that:

> [e]very licensee should be required after receipt of a written request from any other licensee with a GSA that overlaps the GSA of the recipient

> licensee to take such steps as are necessary to manage out-of-band emissions of base stations located within the overlap area such that they are attenuated below the transmitter power (P_{watts}) by at least 67 + 10 log(P_{watts}) dB measured 3 MHz and beyond inside the frequency block of the requesting licensee.[76]

WCA, NIA and CTN also suggested that the written request certify that the requesting licensee intends to initiate service on the affected adjacent channel group on a date certain (not more than one year after the date of the notice), that the recipient be obligated to meet the more stringent requirement by the date certain specified in the request (but no earlier than 90 days after receipt of a request), and that the licensee making the request must after the date certain specified in its request manage its system to provide the same more stringent level of attenuation for the benefit of the recipient licensee.[77] A variation on this proposed operational mask[78] was proposed for base stations located within 1.5 km of each other.[79]

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[76] Second Coalition Supplement at 2.

[77] In addition, the Coalition proposed that the request include a certification that the additional attenuation is required due to the respective technical characteristics of its planned facilities and those of the party receiving the request. They also proposed that the request provide currently available information with respect to its planned network design comparable in scope to the information required to be filed upon completion of construction of its facilities. Under their approach, the requesting licensee should have an ongoing obligation to advise the recipient of any changes to the network design and any changes as to the date certain on which it will commence service. *See* Second Coalition Supplement at 2 n.4. *See also* Initial Coalition Proposal at 29. WCA believes that these requirements should also be incorporated into Section 27.53(l)(2) on reconsideration.

[78] To avoid any possible confusion in connection with equipment certification, the Commission on reconsideration should emphasize that because this is an "operational mask," licensees should be free to meet it either through equipment filtering, through devotion of spectrum to guardband, and thus it should have no bearing on equipment certification. The objective of this operational requirement is to limit the applicability of the more stringent spectral mask to those situations where it is needed to protect an adjacent channel licensee, allowing all licensees the flexibility to utilize the transmission equipment that is appropriate where synchronized technologies are deployed on adjacent channels.

[79] *See* Initial Coalition Proposal at 29. WCA notes that the language of Section 27.53(l)(2) is somewhat unclear as to the circumstances under which attenuation of 67 + 10 Log (P) -20 log (D_{km}/1.5) is required. Although a literal reading of the rule suggests that this standard applies in all cases, presumably, the Commission's intent was to require such attenuation only in cases of a documented interference complaint.

Unfortunately, citing nothing more than a bald assertion by Telecommunications Industry Association ("TIA") that the Coalition Proposal for only imposing the tighter mask upon request and under certain circumstances was "unworkable,"[80] the Commission rejected the Coalition's suggestion that the more stringent mask be implemented on request, and instead required the filing of a "documented interference complaint" establishing interference.[81] Indeed, while TIA did not dispute that adoption of the Coalition Proposal would mitigate adjacent channel interference, or provide any technical or business rationale to support its negative assessment, the dual mask received substantial support from the BRS/EBS industry.[82]

The fundamental problem with the documented complaint approach adopted in the *Report and Order* is rather simple – it requires the victim operator in a given market to suffer actual interference to its operations while it tracks down the source of the interference, documents its case, presents that case to the Commission and secures a favorable ruling. While this approach makes eminently good sense in situations where interference is expected to occur only rarely, the record before the Commission in this proceeding leaves no doubt that where licensees in the same market utilize non-

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Thus, if the Commission does not adopt WCA's proposal for elimination of the documented complaint requirement, it should at a minimum clarify Section 27.53(l)(2).

[80] *See* Comments of Telecommunications Industry Ass'n, WT Docket No. 03-66 at 3 (filed Sept. 8, 2003).

[81] *See Report and Order*, 19 FCC Rcd at 14215 ¶ 128.

[82] *See* Coalition Comments at 48-58; BellSouth Comments at 7 n. 12; Sprint Comments at 4-6; Comments of ComSpec, WT Docket No. 03-66 at 3-4 (filed Sept. 8, 2003); Reply Comments at CelPlan, WT Docket No. 03-66 at 2-4 (filed Oct. 22, 2003); Reply Comments of California Amplifier, WT Docket No. 03-66 at 2 (filed Oct. 22, 2003); Reply Comments of Blake Twedt and John Dudeck, WT Docket No. 03-66 at 2 (filed Oct. 22, 2003); Reply Comments of SOMA Networks, WT Docket No. 03-66 at 2 (filed Oct. 23, 2003) ("As a BWA Manufacturer, SOMA supports a mask of 43 + 10 log (P) for general equipment certification as well as an exceptional operator-managed mask of 67 + 10 log (P)."); Comments of IPWireless, WT Docket No. 03-66 at 18 (filed Sept. 8, 2003).

synchronized technologies, interference is inevitable absent attenuation of out-of-band emissions by base stations by at least 67 + 10 log (P).[83] Thus, the need for a more stringent operational restrictions on out-of-band emissions is patent.

The *Report and Order* does not explain how, given the clear need for non-synchronized operations to meet this benchmark, the public interest could possibly be advanced by requiring actual operations to suffer interference before the more restrictive mask can be invoked. WCA believes the best interest of consumers will be served by adopting the Coalition Proposal approach to this issue on reconsideration, and thereby avoid the need for actual service to be disrupted.[84]

In addition, the Commission should make clear, as proposed by WCA, NIA and CTN, that the more stringent element of the dual mask set forth in Section 27.53(l)(2) can be invoked by any licensee in the LBS or the UBS that has a GSA overlapping the GSA of recipient of the request, regardless of whether it is licensed to operate on a first adjacent channel. Although this departure from the Coalition Proposal is not explained in

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[83] As the Coalition explained, the proposed 67 + 10 log (P) dB "operational mask" was determined after extensive technical analysis by the WCA Technical Task Group to afford licensees a practical vehicle for deploying non-synchronized technologies without risk of interference in the absence of voluntary coordination. To provide reasonable protection to non-synchronized systems, it was determined that no system should be required to suffer more than a 1 dB degradation to the noise floor. As reflected by the newly-adopted language of Section 27.53(l)(2), the result is an adjusted noise floor requirement of -107 dBm. To satisfy this requirement, two non-synchronized adjacent systems complying with only the 43 + 10 log (P) dB mask would require a 24.6 km separation between facilities (assuming 17 dBi gain antennas and line of sight between the facilities). This clearly is unacceptable if two or more non-synchronized systems are to coexist in a single market. *See* Coalition Comments at 53.

[84] If the Commission retains the documented complaint requirement, it must modify the definition of a documented complaint in Section 27.4. The language has been lifted almost verbatim from former Part 74 rules designed to address interference at EBS video receive sites, and is not appropriate for addressing dual mask issues. First, the language regarding the submission of videotape evidence should be eliminated – while videotape is an appropriate means of documenting interference at an EBS receive site where video programming is being viewed, it is a meaningless concept for base station interference. Second, the requirement that a documented complaint include a request for a temporary order to have the interfering station to cease operations is inappropriate – since the ultimate relief is attenuation of out-of-band emissions by 67 + 10 log (P) measured 3 MHz outside the applicable channel edges, that should be the temporary relief sought.

the *Report and Order*, Section 27.53(l)(2) limits eligibility to file a documented complaints just to an "adjacent channel licensee." It is not clear exactly what this means. However, the risk of interference from a base station's out-of-band emissions extends beyond just the first adjacent channel, and thus it is suggested that any licensee with an overlapping GSA be permitted to invoke the stricter mask.

In addition, Section 27.53(l)(2) provides that when facilities are collocated, each license must limit its undesired signal level at the affected licensee's base station receiver(s) at the collocation site to no more than -107 dBm. However, to achieve the objective of the rule and provide certainty, the rule should provide for the maximum undesired signal level to be expressed as -107 dBm/5.5 MHz measured at each pre-existing receiver (*i.e.* after the reception antenna and line).

B. Section 27.53(l)(4) Should Apply To All User Stations, And Additional Attenuation Should Be Required With Respect To Certain Fixed User Stations..

Newly-adopted Section 27.53(l)(4) of the Rules provides that "for mobile digital stations, the attenuation factor shall not be less than 43 + 10 log (P) dB at the channel edge and 55 + 10 log (P) at 5.5 MHz from the channel edges." WCA certainly approves of that provision, since it tracks the Coalition Proposal.[85] However, consistent with the Coalition Proposal, WCA believes that this requirement should be applied to all user stations, not just those that are mobile.[86] There is no logical reason why mobile user stations should be subject to this requirement, and not others.

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[85] *See* First Coalition Supplement at 2-3.

[86] *Id.*

While this spectral mask should be adequate in most situations, it does not address sufficiently the risk of interference caused by out-of-band emissions from fixed user stations that utilize a transmission antenna that is affixed to the outside of a building or other non-antenna structure, or appurtenance thereto, or that is affixed to a tower, mast or other structure installed outdoors for the purpose of supporting an antenna. These user stations will tend to be higher above ground level, and operate at higher EIRPs because of the use of higher-gain antennas. Certainly, WCA recognizes that these fixed stations have a role to play, particularly in more rural areas where economic considerations dictate that base stations be farther part and thus outdoor, high-gain antennas must be installed at customer locations. Specifically, WCA proposes that the Commission add a new Section 27.53(l)3) as follows, and renumber existing subparagraphs (3) through (5) as (4) through (6):

> (3) For non-mobile consumer digital stations transmitting via an antenna that is either (i) affixed to the outside of a building or other non-antenna structure, or appurtenance thereto, or (ii) affixed to a tower, mast or other structure installed outdoors for the purpose of supporting antennas, the following emission limits apply:
>
> > (a) If such antenna is mounted such that the radiating element is located at or below 20 feet above ground level, or if such antenna is located in a county with a population density of 100 or fewer persons per square mile, based upon the most recently available population statistics from the Bureau of the Census, the out-of-band emissions associated with such antenna's transmissions shall be attenuated by at least 43 + 10 log (P) dB (measured at the channel's edges) and 55 + 10 log (P) (measured at 5.5 MHz from the channel's edges), except that:
> >
> > > (i) if a documented interference complaint is received from a licensee with an overlapping GSA and such complaint cannot be mutually resolved between the parties, the party causing the interference shall reduce the out-of-band emissions associated with the offending antenna's transmissions by at least 67 + 10 log (P) dB (measured at 3 MHz from the channel's edges);

> (ii) upon request received from any licensee with an overlapping GSA and an operational base station, the operator(s) receiving such request shall reduce the out-of-band emissions associated with the transmissions from all such devices' antennas located within 1.5 km radius of the requesting adjacent channel licensee's operational base station by at least 67 + 10 log (P) – 20 log(Dkm/1.5) (measured at 3 MHz from the channel's edges);
>
> (b) If such antenna is located in a county with a population density of greater than 100 persons per square mile, based upon the most recently available population statistics from the Bureau of the Census, and mounted such that the radiating element is located greater than 20 feet above ground level, the out-of-band emissions associated with such antenna's transmissions shall be attenuated by at least 67 + 10 log (P) dB (measured at 3 MHz from the channel's edges), except that if such non-mobile consumer digital station is separated by less than 1.5 km from a pre-existing base station, the out-of-band emissions associated with such antenna's transmissions shall be attenuated by at least 67 + 10 log (P) – 20 log(Dkm/1.5) (measured at 3 MHz from the channel's edges).

WCA submits that this change will effectively address the potential for interference from these fixed user stations to base stations of another operator in the same market, without unduly restricting the ability of rural operators to deploy designs that rely on higher-gain outdoor antenna installations.

C. The Rules Governing BRS Out-Of-Band Emissions Below 2495 MHz Must Be Clarified.

To mitigate interference from those BRS channel 1 licensees who are being forced to relocate from the 2150-2162 MHz band to the 2496-2502 MHz band to Big LEO Mobile Satellite Service ("MSS") operations below 2495 MHz, the Commission created a guardband at 2495-2496 MHz and imposed certain spectral mask requirements on relocated BRS channel 1 licensees who are relocated. WCA believes that on reconsideration, it is necessary to clarify one of those requirements, and eliminate the other.

First, the Commission should clarify that the new 1 MHz guardband at 2495-2496 MHz will be considered in measuring compliance by the BRS channel 1 licensee with its spectral mask requirements. Newly-adopted Section 27.53(l)(2) of the Rules affords the MSS licensee operating immediately below BRS channel 1 with the same rights relative to the dual base station/fixed user station spectral mask as is afforded other BRS/EBS licensees. Thus, Section 27.53(l)(2) allows the MSS licensee to file a documented complaint and force the BRS channel 1 licensee to meet the 67+10log(P) mask for its base station and fixed user operations. Read literally, the BRS licensee would be required to meet the 67+10log(P) requirement 3 dB below 2496 MHz – the lower edge of its channel. However, such an interpretation would deprive the BRS channel 1 licensee of the benefit of the guardband between 2496-2496 MHz. Thus, Section 27.53(l)(2) should be amended to make clear that the more stringent 67+10log(P) spectral mask only need be met at 2492 MHz – 3 MHz below the guardband.

Second, Section 27.53(l)(4) provides that with respect to mobile digital stations, an MSS licensee "may also submit a documented interference complaint against BRS licensees operating on BRS1 on the same terms and conditions as adjacent channel BRS or EBS licensees." This is strange because BRS and EBS licensees have no right to file a documented complaint relating to emissions from mobile digital stations. It appears that this language was inadvertently copied from Section 27.53(l)(2). It clearly should be deleted.

VIII. TO PROVIDE LICENSEES WITH CERTAINTY REGARDING THEIR AUTHORIZED SERVICE AREA, THE COMMISSION SHOULD CLARIFY HOW GSA BOUNDARIES WILL BE ESTABLISHED UNDER CERTAIN CIRCUMSTANCES.

A critical component of the Coalition Proposal was the proposal by WCA, NIA and CTN to eliminate the current system by which many licensees had overlapping protected service areas ("PSAs") and instead afford every licensee an exclusive GSA.[87] Thus, WCA is pleased that the *Report and Order* concludes that the Coalition approach "is the best compromise to remedying the difficulties associated with" the former system.[88]

To avoid future conflicts regarding GSA boundaries, however, WCA believes that on reconsideration the Commission should modify Section 27.1206 to clarify that in drawing the chords used to "split the football" and thereby create GSAs, great ellipses should be utilized rather than straight lines. As WCA, NIA and CTN pointed out in their comments in response to the *NPRM*, if great ellipses are not employed, there will be areas, sometimes as wide as one kilometer, that are not assigned to either GSA.[89]

In addition, the Commission should provide clarification as to how GSA boundaries will be drawn under certain circumstances. GSA boundaries were generally fixed as of today, the effective date of the rules adopted in the *Report and Order*.

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[87] *See* Initial Coalition Proposal at App. A.

[88] *Report and Order*, 19 FCC Rcd at 14192 ¶ 60. Although not entirely clear from the language of Section 27.1206(a), WCA presumes that in endorsing the Coalition's approach to "splitting the football", the Commission has adopted all of the approach set forth in Appendix A to the Initial Coalition Proposal for dividing overlaps, depending on the number of overlapping PSAs.

[89] *See* Coalition Comments at 58 n. 115. There, WCA, NIA and CTN pointed out that the best accuracy is obtained considering the Earth as an ellipsoid and the ellipsoid calculations done according to "Map Projections- A working manual" by John P. Snyder of the US Geological Survey. The ellipsoid parameters should be the ones adopted by World Geodetic System 1984, (WGS 84), which is an earth fixed global reference frame, including an earth model. It is defined by the major (equatorial) radius, *a,* and the minor (polar) radius, *b*, from which the second-order parameters of flattening (or ellipticity), *f*, and the eccentricity, e, are derived, where $f = [1-(b/a)]$ and $e^2 = (2f - f^2)$.

However, in some cases, it is not entirely clear how those boundaries are to be drawn and/or what impact future developments may have on boundaries. Therefore, WCA suggests that the Commission confirm the following:

- Where there is pending as of January 10, 2005 an application for a new incumbent station with a PSA that overlaps that of a licensed incumbent station, the GSA of the incumbent station is created by "splitting the football" and, if the pending application is ultimately dismissed or denied, the territory covered by the GSA of the applied-for station reverts to the BRS BTA holder (if a BRS application) or to EBS white space (if an EBS application).
- Where there is pending as of January 10, 2005 an application for a modification that would impact the location/size of an incumbent station's GSA and the resulting splitting of a football with another station, the GSAs should be calculated by "splitting the football" based on the current authorizations, and if the modification is granted, the GSAs will be immediately redrawn upon the grant of the modification.
- Where there is pending as of January 10, 2005 an application for review or petition for reconsideration of the dismissal or denial of an application for a new or modified station that has a PSA overlapping another station's PSA, the facilities proposed in the dismissed or denied application should not be considered in establishing GSAs. However, the GSA of the incumbent licensee will be subject to carving back consistent with the "splitting the football" rules if the dismissed/denied application is reinstated.
- Where there is pending as of January 10, 2005 an application for review or petition for reconsideration of the forfeiture or cancellation of a license that has a PSA overlapping another station's PSA, that license should not be considered in establishing GSAs. However, the GSAs of licensee with overlapping GSAs will be subject to carving back consistent with the "splitting the football" rules if the forfeited or cancelled license is reinstated.
- Where an incumbent station license was in existence as of January 10, 2005 and caused a splitting of the football, and that incumbent station license is later forfeited, the reclaimed territory reverts to the BRS BTA holder (if BRS spectrum) or to EBS white space (if EBS spectrum) regardless of whether the action/inaction that caused the forfeiture occurred prior to January 10, 2005.

IX. CONCLUSION.

WCA thanks the Commission and its staff for the effort that went into the *Report and Order*. With adoption of the rule changes proposed herein and in WCA's comments in response to the *FNPRM*, the Commission will have succeeded in dismantling the

broadcast model regulatory scheme that for so long plagued the 2.5 GHz band and establishing a model that will promote the deployment of a wide variety of innovative service offerings.

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